IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

D. HOOGENDORN,
Plaintiff in Error,

vs.

OTTO DANIEL,
Defendant in Error.

No. 2075.

Error to the District Court for the District of Alaska, Second Division.

Brief of Plaintiff in Error

F. E. FULLER,
J. W. ALBRIGHT,
Attorneys for Plaintiff in Error.
1314-1315 Alaska Building, Seattle.

In the
United States Circuit Court of Appeals
FOR THE NINTH CIRCUIT

D. HOOGENDORN,
Plaintiff in Error,

vs.

OTTO DANIEL,
Defendant in Error.

No. 2075.

Error to the District Court for the District of Alaska, Second Division.

Brief of Plaintiff in Error

STATEMENT.

This action was brought by Otto Daniel, the defendant in error, to recover from D. Hoogendorn, the plaintiff in error, damages alleged to have been sustained by reason of failure to convey two placer mining claims which Hoogendorn had entered into a written contract to convey to Fred Ruhl, Henry Ruhl and Harry Ruhl for the sum of $3,500, which contract had been assigned by them to Daniel. The

complaint sets out in full a deed from the Ruhls to Hoogendorn, the contract to reconvey, the assignment thereof to Daniel, and the decree in an action by Daniel against Hoogendorn for specific performance of the contract. The items of damage claimed are:

1. $1,500.00, for expenses paid and time lost in going from Portland, Oregon, to Alaska, in September, 1907, to make payment for and perfect title to the claims under the option to purchase, and for expenses and time in returning to the States after failure to obtain possession of the mining claims.

2. $1,500.00, on account of failure to secure employment as marine engineer during the winter of 1907 and 1908.

3. $150.00, for loss on sale of a boiler purchased for use on the mining claims.

4. $1,000.00, for loss of time and expenses during the pendency of the suit for specific performance and the appeal.

5. $30,000.00, for being prevented from using and occupying the mining claims and extracting the gold therefrom, from September 13, 1907, to June 26, 1910, i. e., from the time it is alleged con-

veyance of the mining claims should have been made, until the time that Daniel went into possession thereof after the filing of the mandate in the former case. Included in this item are the same damages claimed in the action against the sureties on the appeal bond now pending upon writ of error in this court. (*Dashley et al. v. Daniel,* No. 2074.)

A motion to strike from the complaint the allegations concerning the prior action, and all the allegations of damage, except in regard to the last mentioned item, was denied by the court, after which answer was made, trial had before a jury, and a verdict returned against plaintiff in error for $10,275.00. From this verdict, on motion for new trial, $3,525.00 was remitted, and judgment was thereupon entered for $6,750.00 and costs, and this writ of error sued out. Error in the order of the court refusing to strike immaterial matter from the complaint, in the admission of incompetent evidence upon the trial, and in the instructions of the court upon the evidence as to the measure of damages, is assigned as follows:

SPECIFICATION OF ERRORS.

1. The court erred, by its order made December 3, 1910, denying defendant's motion to strike from plaintiff's complaint paragraphs 5 to 10, inclusive.

2. The court erred, by its order made December 3, 1910, denying defendant's motion to strike from plaintiff's complaint that part of paragraph numbered 12 from the beginning thereof to and including the figures "1,000" in line 22, page 8, as follows:

"That the said plaintiff in the month of July, 1907, was residing at Deering, Alaska, and in said month of July, 1907, left for the States, but that he intended to accept a position as marine engineer then promised him at a salary of $200.00 a month: that on arriving in the City of Seattle on or about the 15th day of July, 1907, the plaintiff entered into negotiations with the Ruhls, parties to said contracts, Exhibits "A" and "B" of this complaint, and afterwards purchased the interest of said Ruhls in the said placer claims Nos. 7 and 8 below Hannum as hereinbefore alleged, and thereupon plaintiff in the month of September, 1907, returned to Alaska for the purpose of perfecting his title to said claims in accordance with said contracts, Exhibits "A" and "B", and of remaining during the winter and mining said claims by the drifting process; that on the refusal of defendant to convey said property to plaintiff and to surrender possession of the same to him, plaintiff was compelled to return to the States, and he was thereby, by reason

of money spent in paying his expenses in coming to Alaska and returning to the States, and for the time wasted, damaged in the sum of $1,500.00; that in the meantime the position which was to be filled by plaintiff, and which had been promised to him had been filled by another person and the plaintiff was unable during all the winter of 1907 and 1908 to obtain employment, and by reason thereof was damaged in the further sum of $1,500.00; that in the month of August, 1907, for the purpose of mining and operating on said claim plaintiff purchased a boiler, and by reason of the acts and conduct of the defendants in refusing to convey said property to him or to surrender possession to him plaintiff had no use for said boiler and was compelled to make disposition of the same at a loss of over $150.00, and was thereby damaged in said sum of $150.00; that in the summer of 1908 plaintiff came to the District of Alaska for the purpose of trying said case of *Otto Daniel, Plaintiff, vs. D. Hoogendorn et al., Defendants,* hereinbefore set forth; that owing to the said case not being reached for trial until after the close of navigation, plaintiff remained in Alaska during the winter of 1908 and 1909 fully expecting to get possession of said claims for the purpose of working and operating same, and by reason of the acts and conduct of the said defendant after the trial and judgment obtained in the District Court, District of Alaska, Second Division, in appealing said case and giving said supersedeas bond and preventing the plaintiff from obtaining possession of said claim as set forth, was further damaged by the loss of employment and expenses during the fall, winter and spring of the years 1908 and 1909 in the further sum of $1,000."

3. The court erred in overruling defendant's objection to the following question asked the plain-

tiff upon the trial:

"Q. At that time had you made any preparations for mining that property, in the way of purchasing any mining machinery, supplies and so forth?"

In answer to which question the witness stated that previous to returning to Nome, for the purpose of mining this property, he had bought a boiler in Tacoma, shipped it to Deering; that he paid three hundred dollars for the boiler; that the price was reasonable; and that he was not able to use the boiler in operating the claim that winter. (Tr. 33-34.)

4. The court erred in overruling defendant's objection to the following question asked the plaintiff upon the trial:

"Q. Now, prior to your coming to Alaska for the purpose of redeeming this property you purchased from Mr. Hoogendorn, as you have testified, to work that winter, state whether or not you could have obtained, or had offers of, employment for the winter at your regular line of business or occupation?"

To which question the witness answered that he could have obtained employment from the Boston Steamship Company, as chief engineer, at one hundred fifty to two hundred dollars a month, with board; that he was not able to obtain such employ-

ment for the winter after he returned from Alaska, for the reason that he could not take a position only temporarily, and they do not give such a position without one takes a position of permanency; that he could not get such a position that winter; and that he was not employed that winter. (Tr. 34-35.)

5. The court erred in overruling defendant's objection to the following question asked plaintiff upon the trial:

"Q. Now, in the winter of 1908 and 1909 and the spring of 1909, state what arrangements, if any, you made with the Fairhaven Water Company to work the ground, could you have obtained possession of it?"

To which question the witness answered that he had arranged with that company to work the ground on a royalty of forty per cent., with hydraulic elevators; that the company had a supply of water, ditches, pipe-lines, in such manner that it could have worked the ground; that in the summer of 1910 the company worked upon the ground and mined and paid a royalty of forty per cent. upon $36,358.35, and in 1911 mined and paid royalty upon over $70,000. (Tr. 36-39.)

6. That the court erred in overruling defendant's objection to the following question asked the plaintiff upon the trial:

"Q. For what purpose were you remaining in that winter?"

In answer to which question the witness stated that he remained to get possession of the ground; that could he have got possession during that winter of 1908-9 he could have mined it by the drifting process; that he believed that the ground could be mined by that process at a profit. (Tr. 37.)

7. That the court erred in denying defendant's motion to strike out the foregoing testimony of the plaintiff. (Tr. 43.)

8. The court erred in instructing the jury, against defendant's objection, as follows:

"In arriving at the amount of damages you will allow the plaintiff, if you believe from the testimony that you should allow him any, you will allow him for the time during which he was kept out of the possession of the property he could have been profitably employed in working the property." (Tr. 47.)

9. The court erred in instructing the jury, against defendant's objection, as follows:

"You may then allow him such damages as he could have earned at his profession or trade, whatever you may call it, less any amount that he may

have earned in the meantime, for the time that he was kept out of possession." (Tr. 47.)

10. The court erred in instructing the jury, against defendant's objection, as follows:

"If you find from the evidence that he purchased a boiler * * * for working this property, and that he was unable to employ his machinery in that capacity or rent it or use it in any other way, he would then be entitled to interest on the money invested in that machinery during the time that he was kept out of the possession by reason of the wrongful act of the defendants." (Tr. 48.)

11. The court erred in instructing the jury, against defendant's objection, as follows:

"If you find from the evidence that the plaintiff could have worked said mining claims at a profit during the winter of 1907 and 8 and 1908 and 9, and the summers of 1908 and 1909, he would be entitled to legal interest at the rate of 8 per cent. per annum upon the profits that he would have made, if any, during the period that he was kept out of the use of the money." (Tr. 48-49.)

12. The court erred in giving and entering judgment for the plaintiff.

13. The court erred in giving and entering judgment for the plaintiff and against the defendant for the sum of $6,750.00 and costs.

ARGUMENT.

I.

The first specification of error is for the refusal of the court to strike from the complaint paragraphs from 5 to 10, wherein are set forth the proceedings and pleadings in the former suit for specific performance of the optional contract. While an erroneous ruling on such motion may not in all cases be reversible error, it is such whenever it plainly appears that the ruling might be injurious to the opposite party.

To set forth all of plaintiff's cause of action nothing more was necessary than allegations of the execution of the contract to sell, the assignment thereof to Daniel, the breach of the contract by Hoogendorn, and the damages sustained by Daniel by reason of the breach. The remainder of the complaint is surplusage. Had Hoogendorn denied the contract, it might have been proper to plead in reply, as matter of estoppel, the judgment in the former suit. But the proceedings in that action were no part of the case in chief. Such allegations and the evidence given to support them, although the allegations had not been denied, brought a large

amount of immaterial matter before the jury which must have been prejudicial to plaintiff in error; and must have given them the impression that he wrongfully and without excuse attempted to avoid the obligations of his contract, and that both the District and the Appellate Court had so decided. It was in effect getting before the jury Daniel's side of the former case without the grounds on which Hoogendorn had contested it, and as the jury had the pleadings and the exhibits annexed thereto with them while deliberating, the amount of their verdict was undoubtedly thereby greatly affected.

The motive for breach of contract is immaterial.

Globe Refining Co. v. Landa Cotton Oil Co., 190 U. S. 547.

Grand Tower Co. v. Phillips, 23 Wall. 471.

2 *Sedgwick on Damages* (8th Ed.), Sec. 603.

II.

Error in refusing to strike from the complaint the allegations of certain items of damage will be considered later in connection with the assignments of error in the admission of evidence and instructions given to the jury. It is contended that the

complaint itself plainly shows that such items of damage were not the necessary or proximate results of the breach of contract.

For the first item of $1,500, for expenses and time of going from Portland to Alaska and returning to the States in the summer and fall of 1907, Hoogendorn clearly was not responsible. The trip to Alaska was made before Hoogendorn had any notice of a contract relation with Daniel. There would be as much reason to hold him liable because the Ruhls failed to remain on the ground so that Daniel could deal with them without expense, as to hold him for this trip. Nor did Hoogendorn have anything to do with Daniel's returning to the States in the fall of 1907. His refusal to convey the property and surrender possession certainly did not "compel" Daniel to make a trip away from Alaska. Daniel could as well say that it compelled him to take a trip around the world, had his inclination at that time led him in that direction. And no reason appears why Alaska was not as habitable then as it was later or is now.

Nor was Hoogendorn in any way responsible for the next item of $1,500, claimed because of Daniel's failure to obtain employment during all

the winter of 1907 and 8; nor because the Boston Steamship Company did not keep a position as chief engineer at $150 to $200 per month open for Daniel; nor because Daniel could take a position only temporarily; nor because the company would not give him a position unless he took it permanently. (Tr. 34-35.)

The fourth item of $1,000 for damages for loss of employment and expenses during the fall, winter and spring of 1908 and 9 is of course clearly a claim for wages and expenses during the pendency of the former suit. (Tr. 37.)

There is no rule of law by which a party can hold an adversary for loss or value of time expended in looking after litigation.

Barratt v. Grimes, 63 Pac. 273.

The Stanley Dollar, 160 Fed. 914.

13 *Cyc.* 79.

A separate action cannot be maintained for the expenses of a former suit.

Lovell v. House of Good Shepherd, 44 Pac. 254.

Canter v. Am. & O. Ins. Co., 3 Pet. 307.

Day v. Woodworth, 13 How. 363.

1 *Sutherland on Damages* (2nd Ed.), p. 5, Sec. 3.

13 *Cyc.* 81.

In *Osborne v. Moore*, 12 La. Ann. 714, where the court refused damages claimed for traveling expenses and loss of time in preparing defense and attending court, it is said:

"The very nature of judicial proceedings presupposes that suitors will be put to some trouble in defending and prosecuting suits, but as a general rule these damages are, in the eye of the law, supposed to be covered by the taxed costs. It is desirable that courts of justice should be open to all men, and that suitors should not be deterred from pursuing their rights through fear that they should be compelled to pay for the *loss of time of their adversary*, nor from using in good faith the process of the court, and the means of redress prescribed by law, through apprehensions that they should be mulct in vindictive damages if from any unforeseen cause they should fail in their action."

And in *Nixon v. Cutting Fruit Packing Co.* (Mont.), 42 Pac. 108, *held* that where defendant in good faith defended an action for the salary of an employe he could not be compelled to pay interest for any vexatious delay.

Assignments 3 and 10 are as to the evidence and instructions concerning damages in connection with a boiler alleged to have been purchased for use in mining the property. There was no allegation in the complaint nor any evidence introduced upon which the instructions given could have been

based, even if such loss were a proper element of damages. The complaint alleges that Daniel had no use for the boiler and disposed of it at a loss of $150 (Tr. 9), while the testimony was that he was not able to use it that winter (Tr. 33); and there was no evidence of what disposition he did make of it, or of what value the use for that winter could have been.

Damages for being prevented from working a mine cannot be measured by the losses on machinery bought for its operation.

Dalton v. Moore, 141 Fed. 311.

III.

Specifications 3 to 11 are directed to what are considered the erroneous admission of incompetent evidence, and erroneous instructions concerning recoverable damages and the measure of damages. This is simply an action for breach of a contract to convey real property, and the measure of damages usually applicable in such actions is thus stated:

"Ordinarily where the vendor keeps the vendee out of possession, or refuses to surrender the land, or to deliver possession, especially after the purchase price has been paid, he is chargeable with the rents; or the rents and profits; or the rental value of the land; or the value for its use; or such value where it exceeds the rents and profits; or the value

of the crops. But the vendee cannot recover both the rents and profits, and the value of the use of the land."

3 *Joyce on Damages,* Sec. 1754.

Where the rents and profits are less than the interest on the purchase price, such interest is not recoverable, but only the rents and profits.

Crockett v. May (Kans.), 18 Pac. 905.

Such a rule, however, is not applicable in the case of sale of a mine or mining property; except, perhaps, where the mine has been operated for some length of time and the ore is of uniform value, so that the returns may be calculated with reasonable certainty. Mining property has no rental value in the usual meaning of that term. It can only be used by taking away part of the property itself, and the only profits realizable are from converting the ore or mineral deposits into merchantable metal. In a well-considered case which has long been taken as established law on this subject, the New York Court of Appeals has held that, inasmuch as such damages cannot be estimated by rental value or the value of rents and profits, it is proper to fix them by allowing interest on the amount paid on the purchase price during the time the vendee has been kept out of possession.

Worrall v. Munn, 38 N. Y. 137.

2 *Sutherland on Damages* (2nd Ed.), Sec. 588, p. 1303.

In the case at bar there is no evidence of profits from the working of the claims prior to the breach of contract. Daniel says he had seen them worked, but only by the process of winter mining,—that is, by drifting and taking out a dump in the winter, and sluicing it up in the summer (Tr. 32); that if he had had the claims during the winter of 1907 and 8, he *believes* that he could have worked them at a profit (Tr. 40); and that he could have worked and mined the ground by the drifting process during the winter of 1908 and 9 (Tr. 36-37). This is an entirely different method of mining from the hydraulicking method subsequently employed, and results from one method furnish no basis whatever for estimating results from the other.

There is no evidence of what the profits of such mining by the drifting process would have been, and this is the only method by which Daniel claims he intended to work the claims from the fall of 1907 until the summer of 1909. Yet the court instructed the jury that, if they found Daniel could have worked the claims at a profit during the periods mentioned, he would be entitled to interest on such

profit (Tr. 45). There is absolutely no evidence to which the instruction is applicable. It unauthorizedly directed the jury to find that there would be a profit from such method of mining, and then to draw on their imagination in fixing the amount of profit.

Neither is there any evidence whatever that Daniel could or intended to work the ground in the summer of 1908. Yet the court's instruction (Tr. 45) authorized the jury to find that he could have worked the claims at a profit during that summer.

As to the summer of 1909, the testimony is of a lease to the Fairhaven Water Co., at a royalty of 40 per cent. The amount of profit to Daniel which would have resulted therefrom was attempted to be shown by evidence of the production in the summers of 1910 and 1911, during one of which years the total output was $36,000, and during the other $70,000.

There is no evidence that the paystreak which was then worked was known to exist prior to the breach of the contract, or at any time prior to the actual working in 1910. Nor was there any evidence that the mining was intended to be done in the same place in 1909 as in 1910 or 1911.

The rate of royalty was agreed upon by Daniel and one McLeod. It appeared in the former suit that McLeod was interested in the purchase of the property with Daniel, both then being employes and agents of the Fairhaven Water Co., which had furnished the money for the purchase price, and both being employes of that company at the time the alleged lease or agreement was made. There is no evidence that the royalty stated was reasonable, or that Daniel could have made any profit by mining in any other way than under this alleged lease. No written lease nor any books of account were given in evidence.

Daniel says that he knew approximately the expense of operation for 1911 (Tr. 41), which was about twenty thousand dollars, though he could not tell the amount of the different items. That in the items of expense he included labor, cost of maintenance of the ditch and supplies, but could not say that any allowance was made for the use of water (Tr. 42). It seems that the company operated nowhere else than on these claims during the summers of 1910 and 1911. If the witness had added to his items of expense an allowance for the use of the water, or, what is equivalent thereto, interest on the eight hundred thousand-dollar investment, in the

ditch, and the expense of the company's management, it would be evident that the operation was not profitable for the Fairhaven Water Co., the alleged lessee, and that the claims really were not worked at a profit.

In a case where it was attempted to fix the amount of expected profits in a similar way, the Circuit Court of Appeals for the Eighth Circuit says:

"Compensation for the legal injury is the measure of recoverable damages. Actual damages only may be secured. Those that are speculative, remote, uncertain, may not form the basis of a lawful judgment. The actual damages which will sustain a judgment must be established, not by conjectures or unwarranted estimates of witnesses, but by facts from which their existence is legally inferable. The speculations, guesses, estimates of witnesses, form no better basis of recovery than the speculations of the jury themselves. Facts must be proved, data must be given which form a rational basis for a reasonably correct estimate of the nature of the legal injury and of the amount of damages which resulted from it, before a judgment of recovery can be lawfully rendered. These are fundamental principles of the law of damages." * * * "Litigants cannot be permitted to estimate the money out of the coffers of their opponents in this reckless way."

Central Coal & Coke Co., v. Hartman, 111 Fed. 96.

"A person can only be held responsible for such consequences as may be reasonably supposed to be in the contemplation of the parties at the time of making the contract."

Globe Refining Co. v. Landa Cotton Oil Co., 190 U. S. 540.

Howard v. Stillwell & B. Co., 139 U. S. 199.

Winslow v. Hoffman, 69 Atl. 894; 17 L. R. A. (N. S.) 1130, *note.*

The A. Denicke, 139 Fed. 645.

Hunt v. Oregon P. Co., 36 Fed. 481.

Damages recoverable for the breach of a contract must be the direct and natural consequence of the breach; not remote, speculative, or contingent, but such as could have been foreseen and estimated with reasonable certainty.

Western Union Tel. Co. v. Hall, 124 U. S. 444.

Eckington & S. H. R. Co. v. McDevitt, 191 U. S. 103.

Kelly v. Fahrney, 97 Fed. 176.

Central Trust Co. v. Clark, 92 Fed. 293.

Gayton v. Day, 178 Fed. 249.

Of this subject, the text of *Cyc.* (Vol. 13, p. 25) has to say:

"While it is the object of the law to compensate a party for all damages which may result to him from the injury complained of, yet where such injuries are remote, contingent, or speculative, and do not directly follow from the injury or breach, they will be denied. A rule of damages which embraces within its scope all the consequences which might be shown to have resulted from a failure or omission to perform a stipulated duty or service

would be a serious hindrance to the operations of commerce and to the transaction of the common business of life."

Damages for the breach of a contract preventing the carrying on of a business not yet in operation are too speculative to be allowed.

Standard Oil Co. v. Carter, 62 S. E. 150; 19 L. R. A. (N. S.) 155, and *note*.

Before such profits can be allowed, there must be proof of the profits before, as well as during the time of interruption.

Taber Lumber Co. v. O'Neal, 160 Fed. 602.

Royalties on amounts which might have been mined are purely conjectural, and damages cannot be fixed on such basis.

Coosaw Mining Co. v. Carolina Mining Co., 75 Fed. 861.

Liability for damages for breach of contract is not affected by collateral ventures, and profits on a contract with a third party are not recoverable.

1 *Sutherland on Damages* (2nd Ed.), Sec. 47.

Hunt v. Oregon P. Co., 36 Fed. 481.

Devlin v. New York, 63 N. Y. 8; 53 L. R. A., *note*, pp. 42, 45, 99.

Wallace v. Ah Sam, 71 Cal. 197.

The amount of damages recoverable cannot be

fixed by the plaintiff's agreement with third parties.

Dettering v. Nordstrom, 148 Fed. 84.

The A. Denicke, 138 Fed. 645.

Those profits are usually considered too remote, among many others, which are not the immediate fruits of the principal contract, but are dependent upon collateral engagements and enterprises, not brought to the notice of the contracting parties, and not, therefore, within their contemplation or that of the law.

Bell v. Reynolds, 78 Ala. 515; 56 Am. Rep. 52.

Under the authorities cited, the alleged items of damage are not only speculative and uncertain, but none of them is the direct or necessary consequence of the alleged breach of contract. None of them could have been within the contemplation of the parties to the contract at the time of its execution. The Ruhls could not add to Hoogendorn's liabilities by assigning the contract, for the obligations under the contract became fixed at the time the contract was made. The theory of the evidence, however, was that the amount of damages could be determined by the vagaries of the assignee, and by the operations of the lessee of the assignee, of one of the parties to the contract.

If this theory were correct, instead of complaining of the judgment, plaintiff in error should consider himself fortunate that the Ruhls were found in Portland and not in South Africa; that the option was assigned to a marine engineer whose usual salary was from one hundred fifty to two hundred dollars a month, instead of a mining engineer commanding a salary of ten thousand dollars a month, who might have seen fit to travel to Alaska in his private yacht and to take along a three hundred thousand dollar dredge instead of a three hundred dollar boiler; and still more fortunate that a million-dollar paystreak was not discovered before the trial below. It is needless to speculate as to the amount for which he might have been mulcted.

Had the claims been conveyed by warranty deed, and the purchase price paid, only $3,540 and interest could have been recovered by Daniel if title had completely failed and he had *never* got into possession. Here he had the ground, with every ounce of gold in it still untouched. Yet because of two years' delay in getting possession, consumed by the operation of that legal machinery which it is the right of every litigant to invoke, the jury found that he had been damaged three times, and the court

twice, the amount of the purchase price. It seems scarcely possible that the law allows so much greater damages for the lesser injury.

IV.

After delivery to the jury of the instruction relating to the boiler, specified as error under assignment 10, a colloquy occurred between the *nisi prius* judge and counsel for defendant in error (Tr. 46), which resulted in a further instruction by the trial court to the jury (Tr. 46-47) as follows:

"I will instruct you, gentlemen of the jury, that the only kind of machinery which is claimed for was a boiler, and in arriving at your verdict you will take into consideration the fact, if you so find from the testimony, that plaintiff purchased a boiler and moved it onto the claims, and the same method should be employed in computing the damages in this case, if you should find said boiler was purchased, and that the plaintiff was prevented from using the same, *for the price of such boiler.*"

No error seems to have been assigned upon this instruction, and we are therefore precluded from relying upon the manifest error it contains in charging the jury to find damages for *the price of the boiler*, although that the boiler was retained by Daniel and never left his possession is nowhere in dispute. We point out this inconsistent and erroneous instruction in order to permit this court to

exercise its unquestioned power to regard the error of its own motion. Both rule 11 and rule 24 (par. 4) of this court provide that "the court may at its option notice a plain error not assigned."

V.

Besides the foregoing objections to the different alleged items of damage, it is also contended that triple damages were claimed and allowed for the same alleged loss. Daniel certainly is not entitled to be placed in any better position than that in which he would have been had there been no breach of contract. Had he obtained possession of the claims in September, 1907, and begun mining then, his time thereafter would have been occupied with such mining, and his compensation therefor must have come from the profits of such mining, if any. But he also claims, in addition to damages for loss of profits through not mining the claims, damages on account of loss of time, and damages on account of wages he was prevented from earning, during the same period. This is clear, both from the complaint (Tr. 8-9) and from the court's instructions. (Tr. 44.)

That the alleged damages could not be ascertained from the evidence in this case with any reasonable definiteness or accuracy seems evident from

the difference in the amounts found by the jury and by the court, and by the different amount found in the action against the sureties in the action against them.

It is impossible, of course, to say upon what evidence the jury based its verdict. If any incompetent evidence of damages was admitted, or if any improper elements of damage were considered in arriving at the amount of the verdict, this was not cured by the reduction of the verdict by the court. A verdict founded in part upon incompetent evidence cannot be corrected by the court's requiring a remittitur of the amount of the item to which the incompetent evidence related.

Jayne v. Loder, 149 Fed. 21; 7 L. R. A. (N. S.) 984.

It is submitted that the judgment of the District Court should be reversed and a new trial granted.

Respectfully submitted,

F. E. FULLER,
J. W. ALBRIGHT,
Attorneys for Plaintiff in Error.

IN THE

United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

D. HOOGENDORN, *Plaintiff in Error,* *vs.* OTTO DANIEL, *Defendant in Error.*	No. 2075

BRIEF OF DEFENDANT IN ERROR

UPON MOTION TO DISMISS WRIT OF ERROR.

The judgment of which the plaintiff in error complains has been duly and fully satisfied by the authorized attorneys for defendant in error, as appears by the certified copy of the Judgment Docket of the United States District Court for Alaska, Second Division, and the affidavit of Ira D. Orton, Esquire, one of the attorneys for the judgment creditor, the defendant in error here, filed in this Court in

support of the motion to dismiss the writ. "The judgment being satisfied, 'has passed beyond review' for the satisfaction thereof is the last act and end of the proceeding. *Morton v Superior Court,* 65 Cal. 496; 4 Pac. Rep. 489."

People ex rel Dunn vs. Burns, 21 Pac. 540 (Cal.).

The plaintiff in error "had his remedy by motion or otherwise to vacate the satisfaction; but until set aside it is valid and the judgment itself has passed beyond review. Satisfaction is the last act and end of judicial proceedings."

Morton v. Superior Court, 4 Pac. 489.

"The exercise alone of a judicial power equal to that which made the decision, can impart this new life to a judgment which has once been satisfied by an officer or person clothed with power to make the entry. The hearing the evidence and finding the facts on the motion (to vacate the satisfaction) is as purely judicial as is the ascertaining of the amount of the indebtedness and rendering the judgment in the first place."

Hughes v. Streeter, 24 Ill. 650.

There can be no question that the satisfaction of the judgment by the attorneys for the defendant in error ended the controversy between the latter and the plaintiff in error. The Supreme Court of the United States, Federal Courts and all other Courts before whom the question has been brought, have uniformly held that an appeal would not be enter-

tained where an actual controversy between appellant and appellee had ceased to exist.

Mills vs. Green, 159 U. S. 651.
Jones v. Montague, 194 U. S. 147.
Little v. Bowers, 134 U. S. 547.
Singer Mfg. Co. v. Wright, 141 U. S. 696.
Richardson v. McChesney, 218 U. S. 487.
Tomboy Gold Mines Co. v. Brown, 74 Fed. 12.
Tinker v. McLaughlin Farrar Co., 119 Pac. 238 (Okla.).
Whyel v. Coal & Coke Co., 69 S. E. 192 (W. Va.).
Duryea v. Fuechsel, 40 N. E. 204 (N. Y.).

A reversal of the judgment would not give the plaintiff in error any effectual relief, because the amount of the judgment has been paid to the defendant in error and the judgment of the Court upon this writ of error cannot compel the return of that money.

"The duty of this Court, as of every other tribunal, is to decide actual controversies by a judgment which can be carried into effect * * * * It necessarily follows that when pending an appeal from the judgment of a lower Court, and without any fault of the defendant, an event occurs which renders it impossible for this Court, if it should decide the case in favor of the plaintiff, to grant him any effectual relief whatever, the Court will not proceed to a formal judgment, but will dismiss the appeal."

Mills v. Green, 159 U. S. 651, followed in *Jones v. Montague,* 194 U. S. 147.

The defendant in error was bound to satisfy the judgment against the plaintiff in error when the amount of such judgment was paid to him by or for the company which had purchased from plaintiff in error the lands or claims on which this judgment was a lien. It is clear that defendant in error was without fault.

BRIEF OF DEFENDANT IN ERROR ON THE MERITS.

This action is supplementary to a suit for specific performance brought by defendant in error against plaintiff in error to compel the conveyance of two placer claims according to contract entered into between plaintiff in error and the assignors of the defendant in error.

In the suit for specific performance a decree for the plaintiff (the defendant in error here) was affirmed by this Court in *Hoogendorn v. Daniel*, 178 Fed. 765. Shortly thereafter the defendant in error brought this action to recover the damages he sustained by reason of the failure of the plaintiff in error to convey said placer claims in accordance with said contract.

"Incidental to specific performance of a contract to convey land, if the vendor has wrongfully withheld possession, the vendee is entitled to damages for the delay."

36 Cyc. 753-754.

That such is the law is not controverted by counsel for plaintiff in error. They contend that certain

items of damage claimed by defendant in error, which the trial Court's instruction allowed the jury to find, are not recoverable at all, or if they are, cannot be recovered in this action because they are not established by sufficient evidence.

The first item of damages claimed by defendant in error in his complaint is the sum of $1500 representing money spent by him in going from Portland, Oregon, to Alaska for the purpose of perfecting his title to said claims in accordance with the contract or option given by plaintiff in error and in returning to the States upon the refusal of the plaintiff in error to convey and surrender the possession of said claims to the defendant in error, said claim being also for time lost in making said voyage.

The plaintiff in error contends that such item was not a proper element of damages in this action. Conceding for the purpose of argument that such damages are not recoverable, we contend that the trial Court did not commit prejudicial error in refusing to strike from the complaint the allegations relating to such damages in overruling the objections of counsel for plaintiff in error to the testimony introduced, or in refusing to strike said testimony, it is nevertheless a fact that the defendant in error introduced no evidence tending to show what amount of money he spent in going to Alaska and in returning to the States, nor did the Court instruct the jury that he was entitled to recover the expenses of his trip to Alaska. As to Daniel's claim for loss of time spent in making that trip, there is testimony to the effect

that the defendant in error could have obtained employment for the winter following that trip, at from one hundred and fifty to two hundred dollars per month, and that by reason of his trip to Alaska he was unable, after his return to the States, to obtain said employment. Conceding for the sake of argument that such testimony was incompetent, the error in admitting it and in refusing to strike it, was not prejudicial to the plaintiff in error in view of the fact that upon motion for new trial the Court reduced the verdict from $10,275.00 to $6,750.00 (Record pp. 29-30). This reduction of $3,525 equals about three times the amount which the jury may have allowed the defendant in error for his loss of time and employment from the time he left Portland for Alaska in September, 1907, to the time he returned to Alaska in the spring of 1908.

"It is a good practice in a proper case to permit a plaintiff to enter a remittitur, and as so modified to affirm a judgment in his favor, which must otherwise be reversed for error occurring at the trial, but such practice can only be followed where it appears from the record that certain elements of the verdict might have been affected by the error and that the remainder of the verdict could not have been so affected."

Syllabus, Chesbrough et al. v. Woodworth, 195 Fed. 875.

Such practice removed one of the main causes of the law's delay which, more than anything else, has contributed to the spread of dissatisfaction with judges and Courts throughout this country. If such

practice be approved, it necessarily follows that an Appellate Court should not reverse a case when the verdict of a jury has been reduced by the lower Court by an amount equal to the amount which the jury may have allowed for an element of damage erroneously submitted to their consideration, where the remainder of the verdict could not have been affected by the error. In this case, the reduction made by the Court and accepted by the defendant in error, to-wit., the sum of $3,525, is sufficient to cover the damage which the jury may have allowed to the defendant in error for his loss of time and employment from September, 1907, to the summer of 1908, and also from the latter date to the spring of 1909, even though the jury assumed that the defendant in error would have been employed continuously during all these times at the rate of $175.00 a month. Under his own testimony the defendant in error could not have been allowed any greater compensation for his lost time from September, 1907, to the spring of 1909.

We think that this argument disposes of the first item of $1,500; of the second item of $1,500 (Daniel's failure to get employment during the winter of 1907-8) and of the item of $1,000 for loss of employment and expenses during the fall, winter and spring of 1908-1909.

As to the $150.00 claimed by the defendant in error for the loss on the sale of the boiler, which he had purchased for use on the mining claims and which he could not use by reason of the refusal of plaintiff in error to convey the said claims, the

Court, it is true, refused to strike from the complaint the allegation relating to said claim and the defendant in error introduced evidence showing that he bought a boiler for the purpose of working said claims, paid $300.00 for it and was not able to use it. It is also true that the Court in instructing the jury used language which standing alone might have conveyed to the jury the impression that the defendant in error could recover the price of said boiler. The sentence in which such language is found (Record pp. 46-47) is grammatically incomplete, and *no exception was taken to the same.* The Court evidently did not intend to tell the jury that the plaintiff was entitled to recover the price of the boiler. He has just told them that the plaintiff would "be entitled to interest on the money invested in that machinery during the time that he was kept out of the possession (of the mining claims) by reason of the wrongful act of the defendants" (Record p. 45). By the instruction in which the language above referred to was used, the Court meant that the jury could take into consideration the price of the boiler in arriving at their verdict for the amount of damages which the plaintiff was entitled to recover by reason of being unable to use said boiler. It is fair to assume that jurors of ordinary intelligence could not have been misled by the Court's instruction which, as a matter of fact, was meaningless and in itself insufficient to convey the idea that the plaintiff could recover the price of the boiler. In any event, if the Court should conclude that the language was erro-

neous, it may redress any wrong which plaintiff in error may have suffered by reason of the inadvertence of the trial Court, by ordering a remittitur of $150.00.

We come now to the damages claimed by defendant in error by reason of being deprived of the possession of the mining claims and thus prevented from mining and extracting the placer gold and other minerals contained therein until the 27th day of June, 1910 (almost three years). The Court instructed the jury as follows: "If you find from the evidence that the plaintiff could have worked said mining claims at a profit during the winter of 1907 and 1908, and 1908 and 1909, and the summers of 1908-1909, he would be entitled to legal interest at the rate of eight per cent. per annum upon the profits that he would have made, if any, during the period that he was kept out of the use of the money." (Record p. 45.) Counsel for plaintiff in error do not seem to contend that this instruction is erroneous, but they contend that the evidence is insufficient to show that the defendant in error would have worked and mined the ground at a profit during the winters of 1907-8 and 1908-9; that there is no evidence of what the profits of such mining would have been; that there is no evidence that Daniel could or intended to work the ground in the summer of 1908; that the profits which would have resulted to Daniel during the summer of 1909 from his royalty under the lease to the Fairhaven Water Co. were not proved by competent or satisfactory evidence.

Daniel testified that during the winters of 1907-8 and 1908-9 he could have worked the property by drifting process if he had had the possession of it. (Record pp. 3 to 37-38, 40.) He also testified that from his knowledge of the ground and the conditions existing in the country in 1907 and 1908, these claims would have been mined at a profit by drifting process. (Record p. 40.) Daniel's testimony on these points is the only testimony in the case. It stands uncontroverted and unimpeached. The evidence further shows that during the summer of 1910, after Daniel had obtained possession of the property, the Fairhaven Water Co. worked the ground under lease from Daniel, and took out of part of one claim (two pits two hundred feet square on No. 7) a little over Thirty-six thousand, three hundred and fifty dollars, forty per cent. of which was paid to Daniel as his royalty. (Record pp. 38-39.) During the summer of 1911 the same company under same lease took out over Seventy thousand dollars, of that *gross* amount, *forty* per cent. was paid to Daniel. (Record p. 41.)

The evidence further shows that the defendant in error had arranged with the same company with working the claims on the same royalty, during the summer of 1909 and that said company could have so worked said claims during that time if defendant in error had had possession of the property. (Record pp. 36-37.) The gold which was taken out in 1910 and 1911 was in the ground in 1907, 1908 and 1909, and certainly what was taken out in 1910 and 1911 is competent evidence of what could have been

taken out in the former years. It seems to us that the contentions made by learned counsel for the plaintiff in error, in reference to the sufficiency of the evidence, the alleged remoteness and uncertainty of the damages, etc., are without merit, and the few authorities they cite inapplicable. In their contention that the defendant in error was not entitled to more than the interest on the purchase price of the claims, they overlook the fact that Daniel was entitled to the benefit of his bargain. The same must be said of their proposition that if the title had completely failed, Daniel could not have recovered more than the purchase price and interest. As they remark in their brief, the rule governing the remedies of the vendee of land is not applicable in the case of a sale of a mine or mining property.

The first specification of error, to-wit., the refusal of the Court to strike from the complaint the paragraphs wherein are set forth the proceedings and some of the pleadings in the suit for specific performance of the option given to Daniel's assignors is also without merit. The defendant in error was clearly entitled to show in this action that the plaintiff in error had breached his contract, by refusing to convey the claims which he had agreed to convey; that he, the defendant in error, was kept out of possession of the said claims until June, 1910, as a result of the refusal of the plaintiff in error to perform his contract, and of the time necessary to carry to final judgment the suit for specific performance of that contract. The proceedings and pleadings in

said suit were of no greater prejudice to plaintiff in error than testimony in regard to such proceedings would have been. He was not prevented in any way from presenting to the jury his side of the former case, the grounds upon which he contested the suit for specific performance, if indeed he had any substantial grounds upon which to contest the same.

We respectfully submit that the judgment of the District Court should be affirmed.

Respectfully submitted,

W. T. DOVELL,
IRA D. ORTON,
Attorneys for Defendant in Error.